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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JOSEPH C. WAGNER, JR. AND JEFFERY L. ATCHLEY,

Petitioners,

V.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

Whether the Office of Personnel Management (OPM) interpretation and application of the Presidential Directive of December 9, 1981 barring former air traffic controllers fired for striking in August, 1981 from reemployment with the Federal Aviation Administration so as to impose the bar for more than three years was unreasonable or in excess of its authority under 5 U.S.C. §7311.

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No.

IN THE SUPREME COURT OF THE UNITED STATES
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JOSEPH C. WAGNER, JR. AND JEFFERY L. ATCHLEY,

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V.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Joseph C. Wagner, et al, petition for a writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

QUESTIONS PRESENTED

Whether the Office of Personnel Management (OPM) interpretation and application of the Presidential Directive of December 9, 1981 barring former air traffic controllers fired for striking in August, 1981 from reemployment with the Federal Aviation Administration so as to impose the bar for more than three years was unreasonable or in excess of its authority under 5 U.S.C. §7311.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reprinted as Appendix A to this petition and is published at 783 F.2d 1042 (1986). The opinion of the United States Merit Systems Protection Board is reprinted as Appendix B to this Petition.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on February 18, 1986 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

5 U.S.C. §3301. Civil Service; generally

The President may -

(1) prescribe such regulations for the admission of individuals into the civil service into the executive branch as will best promote the efficiency of that service;
(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

5 U.S.C. §7311 - Loyalty and striking

An individual may not accept or hold a position in the Government of the United States . . . if he . . . - (3) participates in a strike . . . against the Government of the United States . . .

5 C.F.R. §731.303 - Debarment

When a person is disqualified for any reason named in § 731.202, OPM, in its discretion, may deny that person examination for and appointment to a competitive position for a period of not more than 3 years from the date of determination of disqualification. On expiration of the period of debarment, the person

who has been debarred may not be appointed to any position in the competitive service until his fitness for appointment has been redetermined by OPM.

STATEMENT OF THE CASE

The named Petitioners Wagner and Atchley applied to the Federal Aviation Administration (FAA) for appointment as air traffic controllers. The FAA forwarded their applications to the OPM, which denied them a favorable suitability determination. The effect of the denial was to bar them from obtaining positions as air traffic controllers with the FAA.

The OPM denied the petitioners a favorable suitability determination based on a December 9, 1981 Presidential directive which OPM interpreted as imposing an indefinite bar against former air traffic controllers fired for striking in August, 1981 from reemployment with the FAA. Wagner and Atchley appealed the OPM action to the Merit Systems Protection Board where the case was certified as a class action on behalf of more than 400 former air

traffic controllers who, after their discharge for participation in the 1981 strike, were denied favorable suitability determinations by OPM.

Before the Board the case was submitted to the presiding official based upon written submissions by the parties. The parties stipulated that "OPM found each of the appellants to be unsuitable based solely on a determination that they had been removed from their positions with the FAA for striking in August 1981" and "based on its interpretation of the President's directive of December 9, 1981."

The presiding official affirmed the OPM decision indefinitely debarring appellants as unsuitable for FAA employment. The presiding official held (1) that the bar upon employment by persons who struck against the government that 5 U.S.C. § 7311 (1982) imposes is not limited to three years, and (2) that OPM correctly interpreted the President's December 9, 1981 directive as imposing an indefinite bar upon employment by the FAA of former air traffic controllers who were fired for striking.

Since petitioners did not seek review by the Board, the presiding official's decision became a final decision

and petitioners then filed a petition for review of the Board's decision by the Court of Appeals pursuant to 5 U.S.C. §7703.

Petitioners challenged the Board's decision on the grounds (which are the issues the parties stipulated the Board was to decide) (A) that OPM incorrectly interpreted the presidential directive as imposing an ind efinite ban upon the employment by the Administration of the former controllers, and (B) that if the presidential directive did impose such a ban, it was illegal because it was inconsistent with 5 U.S.C. § 7311, which the petitioners interpret as barring strikers from federal employment for only three years.

The Court of Appeals affirmed the Board decision by ruling there was "no basis for rejecting the OPM's interpretation of the presidential directive as imposing an indefinite ban upon employment of the striking controllers by the Administration". In addition, the Court ruled that 5 U.S.C. § 7311 does not limit the prohibition against reemployment of strikers to three years as petitioners contend.

REASONS FOR GRANTING THE WRIT

The Court of Appeals below decided on important question of federal law which has not, but should be, settled by this court. After reviewing 5 U.S.C. § 7311, its legislative history and 5 C.F.R. Part 731 implementing § 7311, the court found that OPM's barring former air traffic controllers fired for striking in August, 1981 from reemployment with the FAA for more than three years was not contrary to the intent of Congress found in 5 U.S.C. § 7311. The court likewise found that OPM's interpretation of the presidential directive of December 9, 1981 as lifting the normal three year bar for non-FAA jobs but imposing an indefinite bar from FAA jobs was reasonable. Petitioners submit that the court erred by not finding that for the OPM to interpret the presidential directive so as to impose an "indefinite" bar was to act contrary to law since congress in enacting 5 U.S.C. § 7311 intended only a three year bar. Indeed, even OPM, prior to the December 9, 1981 presidential directive, had interpreted § 7311 as imposing a maximum three year bar. 5 C.F.R. 731.303. For these reasons, the court below should have found

years by the United States or any such agency. Section 188 was repealed on August 9, 1985 and was replaced by 5 U.S.C. § 7311. The clear words of 5 U.S.C. § 7311 authorized no indefinite bar and nothing whatsoever in the legislative history of the repeal of this section indicates that Congress ever intended to eliminate the prior three year limitation or to blacklist any federal employees for life.

The Court and MSPB below, adhering to a literal and constricted view of the "plain meaning rule" legislative history that is contrary to OPM's imposition of an indefinite bar. In the controllers' case, just as the Supreme Court said in United States v. Dickerson, 310 U.S. 554, 562, (1943), "The very legislative materials" which Defendants "would exclude [from consideration] refute [their] assumption" about the meaning of the words of the statute. This Court went on in Dickerson to say

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntx or construction found by experience to be workable; [Emphasis added and citation omitted.]

The meaning to be ascribed to an Act of Congress can only be derived from a considerable weighing of every relevant aid to construction."

As Chief Justive John Marshall wrote in United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805): "Where the mind labours to discover the design of the legislature, it seizes everything from which it can be derived..." The age-old, outworn rule of "strict constructionism" or the "plain meaning rule", has long been supplanted by less restrictive rules of federal statutory construction. Use of legislative history to determine Congressional intent is appropriate where "the literal words would bring about an end completely at variance with the statute." United States v. Public Utilities Commission, 345 U.S. 295, 315, (1953). "All laws should receive a sensible construction," avoiding "injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." United States v. Kirby, 74 U.S. (7 Wall.) 482, 486-87 (1869). "Nothing is better settled than that statutes should receive a

sensible construction, such as will effectuate the legislative intention, and if possible, so as to avoid an unjust or absurd conclusion." Law Ow Bew v. United States, 144 U.S. 47, 12 S.Ct. at 520 (1892). See also Fleischmann Construction Co. v. United States, 270 U.S. 349, 360, 46 S.Ct. at 289 (1926).

In light of its application to the nation's air traffic control system, the application in this case of this legislation "touch[es] phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these [implications] should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. United States v. Dotterweich, 320 U.S. 277, 280, 64 S.Ct. 134, 136 (1943).

When plain meaning "has led to absurd or futile results ... the Supreme Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole', this Court has followed that purpose, rather than the

literal words." When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Associations, 310 U.S. 534, 543-44 (1940).

Often federal courts have declined overzealous government invitations to follow rigid and overly literal interpretations of statutes, thus preventing and avoiding harsh, unfair, unjust and absurd results. See, e.g. Holy Trinity Church v. United States, 143 U.S. 457 (1892), reversing a prosecution for an employment contract with a British cleric alleged to violate a law intended only to combat alien contract labor. In the same spirit is the case of United States v. Kirby, 74 U.S. (7 Wall.) 483 (1868), involving a prosecution for interference with the U. S. Mails of State law enforcement officers who were doing their duty by arresting a mail carrier for murder.

Though using only the literal language of laws considered in Holy Trinity Church and Kirby would have called for Draconian measures and resulting unjust and absurd results from the U. S. Government, the

United States Supreme Court in its wise and often-used words, found that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Holy Trinity Church, 143 U.S. at 459. So, too, the OPM's interpretation of § 7311 in this case is "not within [§7311's] spirit, nor within the intention of its makers." Id.

"The liberty of the individual must be scrupulously protected ... the safeguards of cherished rights are not to be found in the doctrinaire application of the tenet of strict constructin." United States v. Brown, 333 U.S. 18, 27 (1947), (holding "no rule of construction necessitates our acceptance or an interpretation resulting in patently absurd consequences.") As the Supreme Court said in Harrison v. Northern Trust Co., 317 U. S. 476, 479 (1943), "words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'"

In the hearing before the House of Representatives' Committee on Post Office and Civil Service on the

proposal to replace 29 U.S.C. § 188 with 5 U.S.C. § 7311, Congressman Bennett, the sponsor of H.R. 6590 (the bill which ultimately became 5 U.S.C. § 7311) said:

> "I urge the committee to report favorably on H.R. 6590, which puts in permanent form the policy of Congress which is now found in temporary legislation passed from time to time in the last 15 years. H.R. 6590 also corrects imperfections in previous legislation and reasserts the fundamental principle that the appropriate legislative committee should supervise the enactment of all legislation under its jurisdiction. Preserving this principle is in the public and national interest."

Hearing before the Committee on Post Office and Civil Service, U. S. House of Representatives, 84th Congress, June 22, 1955 at 10.

Throughout the committee's consideration of the measure, there were statements by legislators that establish that Congress' intent in repealing 29 U.S.C. § 188 was only to codify this section permanently and **not to change the three-year limitation.** Congressional intent is also evidenced by the letter from the Chairman of the U. S. Civil Service Commission to the House Chairman of the Committee on the Post Office and Civil Service, in which the following reasoning appears:

> Section 305 of the Labor Management Relations Act forbids striking by Government employees, requires the discharging of an employee who

> strikes and the forfeiture of his civil service status, if any, and makes him **ineligible for employment for 3 years.**
>
> For some years provisions similar to the proposed legislation have appeared in appropriation acts each year. The Commission believes that HR 6590 [now 5 U.S.C. § 7311] represents desirable legislation, since it would put such legislation into permanent form, and would also consolidate and supersede the several statutes which now partially cover the subject. [emphasis added.]

U. S. Code Cong. & Adm. News, 84th Congress, 1st Session, 1955, 2874-2876. Very persuasively, even the Department of Justice, in an opinion sent to the House Committee Chairman from the then Attorney general William P. Rogers, found that 29 U.S.C. § 188 would remain unchanged. U. S. Code Cong. & Adm. News, 48th Congress, 1st Session, 1955, 2876. In summary, the legislative history plainly proves Congress intended the bar from employment with the FAA to be limited to three years.

In light of the manifest intent of Congress, the court below should have avoided "adhering too rigidly to the mere letter of the statute or to technical rules of construction," Oates v. National Bank, 100 U.S. 239, 244 (1879), and, therefore, the court's interpretation should be reversed. The Controllers respectfully

contend the clear, unequivocal purpose of the Congress in passing the section of law relied upon by OPM was merely to codify existing law -- and not to impose a lifetime "blacklist" on government employment upon a class of individuals, like the former controllers, who were led to believe, by government regulations and by reasonable reliance on representations of government officials, that any strike-related debarment from employment as an FAA air traffic controller would be for a period of "not more than 3 years from the date of termination or disqualification." 5 C.F.R. 731.303.

The case at hand presents a manifest and strong showing of "rare and exceptional circumstances" requiring a different interpretation of the literal words of a federal statute. Howe v. Smith, 452 U.S. 473, 483 (1981). For in the contollers' case, not only does the legislative history show a contrary intent and interpretation on the part of the Congressional drafters of the enactment, but the enforcers of the statute also shared that very same contrary interpretation — that the statute provided for a three year bar. 5 C.F.R. § 731.303. It is precisely in the compelling combination of the contemporary Congressional interpretation and

the longstanding agency interpretation of the Congressional acts, that, working hand-in-hand, presents exactly the sort of "rare and exceptional" circumstances that mandate going beyond the "plain meaning" rule of the enactment. Howe v. Smith, supra.

II. OPM's Interpretation Of 5 U.S.C. § 7311 As Imposing An Indefinite Bar Against Former Employees Fired For Striking Against The Federal Government Is Not Reasonable Since Such An Interpretation Is In Contradiction Of Previous Office Of Personnel Management Interpretations That The Statute Only Imposed A Maximum Three Year Bar.

The OPM's significant weight should be given to OPM's prior interpretation that Section 7311 only allowed a maximum three year bar. This three year limitation is reflected in the Office of Personnel Management's own **current** regulations. Not only do OPM's regulations establish that the bar is to be limited to three years, but the Federal Personnel Manual also states clearly that the bar from employment is to be limited to three years. Federal Personnel Manual, Chapter 731, Subchapter 3, §3-6, and Subchapter 4, §4-2 (1965). In short, the administrative agency regulations incorporating a maximum three-year bar clearly recognized the three year limitation intended by Congress and acknowledged in the first sentence of the Presidential directive of December 9, 1981.

"Authoritative administrative constructions" — like those of U.S. Attorney General William P. Rogers, and of the U.S. Office of Personnel Management's own Federal Personnel Manual and OPM Regulations, supra, — "should be given the deference to which they are entitled..." United States v. Turkette, 452 U.S. 576, 580 (1980). Petitioners relied to their detriment on the earlier federal administrative determination of the penalties for violation of 5 U.S.C. § 7311 as being a maximum three year bar. Only when the Agency unilaterally interpreted the Presidential directive to mean a blacklisting for life did the Petitioners learn there was any contrary interpretation. This is indeed the sort of unfair, harsh and oppressive results of federal legislation and its interpretation which the federal courts and federal agencies have protected against for nearly 200 years, as was done in the long line of cases following Holy Trinity Church, supra.

"In the practical administration of the act" McLaren v. Fleischer, 256 U.S. 477, 480 (1921), the U.S. Government itself has long interpreted the statute as containing a three year bar. "It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different

constructions [,] by those charged with the duty of executing it [,] is entitled to great respect and if acted upon for a number of years, will not be disturbed except for cogent reasons. Id. at 481. [Emphasis added] As the Supreme Court said in Udall v. Tallman, 380 U.S. 1, 16 (1965).

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first judicial proceedings — particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new. [citations omitted and emphasis added].

The Court of Appeals below should have given "great deference" to the OPM's first interpretation of 5 U.S.C. § 7311 as it chose to do to OPM's more recent interpretation of the section. Petitioners strongly contend that the agency's newest intrepretation of Section 7311 as imposing an indefinite bar in contradiction of its prior longstanding interpretation that the maximum bar was three years is clearly not reasonable as the Court below found.

In the controllers' case, as the United States Supreme Court found in Zenith Radio Corp. vs. United States, 437 U.S. 443, 457-58 (1978), "[i]n light of these substantial reliance interests, the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons". [Emphasis added]. There are no "cogent reasons" (cf. McLaren, supra) for disturbing the longstanding agency construction of Section 7311 to impose a maximum three year bar against federal employees who strike against the government since the Presidential directive did not alter the normal bar other than to reduce from three years to only a few months the bar period for all non-FAA jobs in the federal government. By radically altering OPM's own interpretation and by interpreting the Presidential directive as imposing an indefinite bar, OPM acted contrary to law in its imposition of an indefinite bar against Petitioners. Accordingly, the Court of Appeals erroneous upholding of OPM's new interpretation of § 7311 should be reversed.

While Petitioners do not deny the President had the power to issue his executive order, that power is also limited by other Acts of Congress, including §

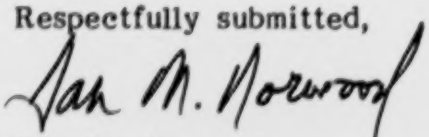
7311, which limits the ability to bar individuals fired as strikers to three years. The fundamentally important separation of powers ordained by the United States Constitution plainly prohibits lawmaking by the President. Accordingly, if the Chief Executive had in his directive acted to invade the province of Congress, the Courts would have to invalidate the action. Youngstown Sheet and Tube Co. v. Sawyer, 345 U.S. 579 (1952) (commonly referred to as the "Steel Seizure Case").

Both the Merit Systems Protection Board and the Court of Appeals found that OPM's interpretation of the Presidential directive was to be given great weight. This "places the cart before the horse", because the December 9, 1981 Presidential directive — like OPM's prior interpretation — found there was only a three year bar provided by § 7311. To find OPM's new interpretation is reasonable is to engage in fancy logic-chopping and say that "three years" now means "forever". Such a ruling ignores the intent of Congress in enacting § 7311, as well as the intent of the President's directive.

CONCLUSION

For the reasons stated above, Petitioners respectfully request this Court to grant their petition in this case for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was sent by regular mail, postage prepaid, this 17th day of May, 1986 to:

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B. Decision of The Merit Systems Protection Board, Dated January 31, 1985. 14

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Joseph C. Wagner, Jr. and JEFFREY L. ATCHLEY	)	Appeal No. 85-2389
Petitioners,	)	
v.	)	MSPB Nos.
OFFICE OF PERSONNEL MANAGEMENT	)	ATO731810709
Respondent.	)	ATO731810626

DECIDED: February 18, 1986

Before MARKEY, Chief Judge, FRIEDMAN, Circuit Judge, and MILLER, Senior Circuit Judge.

FIREDMAN, Circuit Judge.

This petition for review challenges the decision of the Merit Systems Protection Board (Board) affirming the ruling of the Office of Personnel Management (OPM) that former air traffic controllers who had been discharged for striking against the United States were not suitable for employment with the Federal Aviation Administration (Administration). We affirm.

I

The petitioners are former air traffic controllers who were discharged for participating in the illegal air traffic controllers' strike in August of 1981. Shortly

after the strike, OPM determined that the discharged strikers would be debarred from any federal employment for three years. On December 9, 1981, the President issued the following directive to the Director of OPM:

> The Office of Personnel Management has established the position that the former air traffic controllers who were discharged for participating in a strike against the Government initiated on August 3, 1982 shall be debarred from federal employment for a period of three years. Upon deliberation I have concluded that such individuals, despite their strike participation, should be permitted to apply for federal employment outside the scope of their former employing agency.
>
> Therefore, pursuant to my authority to regulate federal employment, I have determined that the Office of Personnel Management should permit federal agencies to receive applications for employment from these individuals and process them according to established civil service procedures. Your office should perform suitability determinations with respect to all such applicants according to established standards and procedures under 5 CFR, Part 731.
>
> After reviewing reports from the Secretary of Transportation and the Administrator of the Federal Aviation Administration, I have

> further determined that it would be detrimental to the efficiency of operations at the Federal Aviation Administration and to the safe and effective performance of our national air traffic control system to permit the discharged air traffic controllers to return to employment with that agency. Therefore, these former federal employees should not be deemed suitable for employment with the Federal Aviation Administration.
>
> I direct you to process their applications for re-employment with the federal government accordingly.

17 Weekly Comp. of Pres. Doc. 1364 (Dec. 9, 1981).

On January 6, 1982, the Director of OPM issued a bulletin to the heads of all executive departments and independent agencies which, after quoting the foregoing presidential directive, instructed that agencies considering employment applications from former air traffic controllers should submit the application and additional information to OPM. The Director further stated:

> (b) All persons whose employment was terminated on account of the strike by air traffic controllers, which began on or about August 3, 1981, shall be determined not to be suitable for reinstatement or appointment

> in any position in the Federal Aviation Administration, because it would be detrimental to the efficiency of that agency by interfering with or preventing its effective performance of its duties and responsibilities (5 CFR 731.202(a)(2)).
>
> (c) The Office of Personnel Management shall consider, on a case-by-case basis, applications for Federal employment, other than in the Federal Aviation Administration, from air traffic controllers whose employment was terminated on account of striking, and shall make appropriate determinations of their suitability for the particular employment for which they may apply....

The named petitioners Wagner and Atchley applied to the Administration for appointment as air traffic controllers. The Administration forwarded the applications to OPM, which denied favorable suitability determinations. The effect of the denial was to bar them from obtaining positions with the Administration.

Wagner and Atchley appealed the OPM action to the Board. The presiding official of the Board certified the case as a class action on behalf of all former air traffic controllers who, after their discharge for participation in the illegal strike, were denied favorable suitability determinations by OPM. The class comprised

more than 400 former controllers.

The petitioners waived a hearing, and the case was submitted to the presiding official based upon written submissions by the parties. The parties stipulated that "OPM found each of the appellants to be unsuitable based solely on a determination that they had been removed from their positions with the FAA for striking in August 1982" and "based on its interpretation of the President's directive of December 9, 1981."

The presiding official affirmed the "OPM decision indefinitely debarring appellants as unsuitable for FAA employment..." The presiding official held (1) that the bar upon employment by persons who struck against the government that 5 U.S.C. § 7311 (1982) imposes, discussed below, is not limited to three years, and (2) that OPM correctly interpreted the President's October 9, 1981 directive as imposing an indefinite and not just a three-year bar upon employment by the Administration of former air traffic controllers who had struck.

The petitioners did not seek review by the Board of the presiding official's decision, which became the decision of the Board. The petitioners then filed the present petition for review of the Board's decision.

II

The petitioners challenge the Board's decision on the grounds (which are the issues the parties stipulated the Board was to decide) (A) that OPM incorrectly interpreted the presidential directive as imposing an indefinite ban upon the employment by the Administration of the former controllers, and (B) that if the presidential directive did impose such a ban, it was illegal because it was inconsistent with 5 U.S.C. § 7311, which the petitioners interpret as barring strikers from federal employment for only three years.

A. The presidential directive explicitly imposed an indefinite ban upon the employment of striking controllers by the Administration. After stating in the first paragraph that the President had concluded that "such individuals, despite their strike participation, should be permitted to apply for federal employment outside the scope of their former employing agency," it provided:

> I have further determined that it would be detrimental to the efficiency of operations at the Federal Aviation Administration and to the safe and effective performance of our national air traffic control system to permit the discharged air traffic controllers to return to employment with that agency. Therefore, these former federal employees should not be deemed suitable for employment with the Federal Aviation Administration.

It is difficult to imagine more precise or explicit language to state that the striking controllers were not to be employed by the Administration.

The petitioners contend, however, that in light of the first paragraph of the directive, which referred to the three-year bar on federal employment and waived that bar for employment outside the Administration, the subsequent provisions of the directive should be construed as continuing that bar upon employment with the Administration only for the three-year period that theretofore had covered all federal employment. That is not what the directive said, however. Moreover, that interpretation is inconsistent with the reasons the President gave for barring employment with the Administration, namely, that employment "would be detrimental to the efficiency of operations at the Federal Aviation Administration and to the safe and effective performance of our national air traffic control system...." There is no indication that the President believed that the adverse consequences of permitting the striking controllers to return to the Administration would continue for only three years after the strike.

Finally, we need not ourselves determine the

meaning of the presidential directive. Our inquiry is a narrower one: whether the Director's interpretation of the directive is arbitrary and capricious or otherwise legally erroneous. The Director has broad discretion in interpreting a presidential directive relating to federal personnel matters. Like the Ninth Circuit, we give "great deference" to that interpretation. Kester v. Campbell, 652 F. 2d 13, 15 (9th Cir. 1981), cert. denied, 454 U.S. 1146 (1982) (Civil Service Commission interpretation of Executive order of President). "To be sustained, the agency's interpretation need not be be the only reasonable interpretation... All that is required is that the interpretation adopted by the agency be reasonable... [and it is] considered reasonable 'unless it is plainly erroneous or inconsistent with the [order].'" Id. at 15-16. (Citations omitted).

Under these standards we have no basis for rejecting the Director's interpretation of the presidential directive as imposing an indefinite ban upon employment of the striking controllers by the Administration.

B. The statute that makes it a crime to strike against the government, 5 U.S.C. § 7311, also provides

nevertheless intended to limit the new ban to three years. Such conclusion would require at a minimum a clear, unequivocal, and explicit statement by Congress that it so intended. The legislative history not only contains no such indication but, to the contrary, is fully consistent with the conclusion that the present statute provides an indefinite ban upon government employment by strikers.

The predecessor of the present statute was the Act of August 9, 1955, Ch. 690, sec. 1, 69 stat. 624. That statute, like the present one, provided that no person who participates in a strike against the United States "shall accept or hold office in the Government of the United States." Prior to that statute, various federal statutes barred strikers from government employment. Those statutes included section 305 of the Taft-Hartley Act, 29 U.S.C. § 188 (1952), which the petitioners treat as the predecessor of the present statute. Another of those statutes, however, section 612 of the Housing Government and contained no time limit on the length of the bar.

The Senate Committee Report of the 1955 Act explained that "[t]his legislation will clarify and

consolidate in a single, permanent, penal statute the rider reenacted each year in appropriation acts as well as certain similar permanent provisions in existing law, which in effect prohibit the employment by the Government of . . . any person who strikes against Government . . . " The provisions that the committee stated the new law would "clarify and consolidate in a single statute" included section 305 of the Taft-Hartley Act, which limited the ban on employment of strikers to three years, and section 612 of the Housing Act of 1947, which did not so limit the bar. The Senate Committee stated that the bill "will prohibit the employment in the Federal Government . . . of any person who . . . participates in any strike against the Act of 1949, ch. 338, 63 stat. 413, 444, barred the expenditure of appropriated funds to pay the salaries or wages or individuals employed by the Housing and Home Finance Agency or by the Department of Agriculture who engaged in a strike against the Government . . . " S. Rep. No. 1256, 84th Cong., 1st Sess. 1, 2, reprinted in 1955 U.S. Code Cong. & Ad. News 2873, 2874.

In light of this history, it is most unlikely that if Congress intended the broad and unequivocal ban upon employment by persons who participated in a strike against the government to be limited to three years, it would not have said so -- either in the statute itself, as section 305 of the Taft-Hartley Act did, or in the legislative history. It did neither. The conclusion is inescapable that Congress meant exactly what it said -- that persons who participated in a strike against the government are barred indefinitely from employment in the government.

The fact that, in a compassionate exercise of clemency, OPM limited the bar on employment other than with the Administration to three years and the President reduced the bar on such employment to less than three years, provides no basis for concluding that the statutory bar itself is limited to three years. Since no question has been raised about the authority of the President and OPM to take such action, we need not and do not consider that issue.

The decision of the Merit Systems Protection Board is affirmed.

AFFIRMED

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:	*	
	*	
JOSEPH C. WAGNER	*	
AND JEFFREY L. ATCHLEY,	*	DECISION NUMBER
On behalf of themselves	*	No.ATO7318410709
and all others similarly	*	DECISION NUMBER
situated,	*	ATO7318410626
	*	(CLASS APPEAL)
Appellants,	*	
	*	
v.	*	Date January 31, 1985
OFFICE OF PERSONNEL	*	
MANAGEMENT,	*	
	*	
Agency.	*	

INTRODUCTION

By petition filed in May and June, 1984, appellants Atchley and Wagner, former Air Traffic Controllers,[1] appealed decisions by the Office of

1. Appellants were removed from employment with the Federal Aviation Administration based on charges of participation in a 1981 strike against the United States, in violation of 5 U.S.C. § 7311, and absence without leave. For a historical background of the strike, see Schapansky v. Department of Transportation, 735 F. 2d 477 (Fed. Cir. 1984), cert. denied, 105 S.Ct. 432 (1984).

Personnel Management (OPM) denying them favorable suitability determinations based on referrals submitted to OPM by the Federal Aviation Administration (FAA). The referrals resulted from employment applications appellants filed with the FAA following their removal from FAA employment.

Because the appellants were not notifed by OPM of any appeal rights (including a time limit for filing an appeal), and the appellants exercised due diligence in pursuing their appeals upon learning of OPM's actions, waiver of any time limits for filing appeals of the suitability actions at issue in these appeals is appropriate. [2] Casey v. Merit Systems Protection Board, 748 F.2d 685, 686 (Fed. Cir. 1984). OPM initially moved for dismissal of the appeals for lack of jursidiction based on the fact that OPM had not issued adverse suitability determinations pursuant to 5 C.F.R. § 731.202, but subsequently acceded to the Board's

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2. Appellants have not raied any harmful error issues.

jurisdiction. OPM's failure to make a suitability determination, by closing the suitability referrals without action and indefinitely debarring the appellants, is tantamount to an adverse determination and is, therefore, subject to the Board's jurisdiction. Cf. Mortensen v. Department of the Army, 13 MSPB 242 (1983) (Board found that an improper denial of a reconsideration opportunity is sufficient to allow it assume jursidiction). Accordingly, the actions are appealable to the Board pursuant to 5 C.F.R. § 731.401. Stewart v. Office of Personnel Management, 7 MSPB 746, 747 (1981).

As a result of discovery initiated by appellants' counsel to determine the class action prerequisite of numerosity, it was ascertained that OPM had closed without action (CWOA), as it had in the cases of Wagner and Atchley, several hundred applications referred to it by FAA for suitability determinations. Appellants' motion that the appeals be maintained as a class action was unopposed by OPM. Based on a finding that the prerequisites for a class action were met, the appeals were certified as a class action maintainable on behalf of a class comprised of the

The class representatives provided individual notices to identified class members. Class members were afforded until January 1, 1985, to exercise the option to be excluded from the class, at which time the class membership closed, except for three appellants (Peter J. Lepari, Gerald M. Kibildis, and John Soucek) who, based on their written requests, were subsequently permitted to join the class. As a result of discovery, 409 class members have been specifically identified. Because a hearing was waived, the class appeal has been decided on the basis of written submissions by the parties.

FINDINGS OF FACT AND CONCLUSIONS

OPM must prove, by preponderant evidence, the reason for its decisions to find the appellants unsuitable for federal employment. 5 U.S.C. § 7701(c)(1)(B). Further, OPM must show that the actions were for such cause as will promote the efficiency of the service. 5 C.F.R. § 731.201. This determination must be based on whether the conduct of the appellants may reasonably be expected to interfere with or prevent effective performance in the positions applied for or whether the conduct of the appellants may reasonably

be expected to interfere with or prevent effective performance by the employing agency of its duties and responsibilities. 5 C.F.R. § 731.202(a).

The Board in Caruso v. Office of Personnel Management, MSPB Dkt. No. SFO77318210987, slip op. at 7 (July 17, 1984), concluded that in light of the seriousness of strike participation, suitability disqualification of such former air traffic controllers for employment in positins having interrelationship with FAA controllers was supported by preponderant evidence and promoted the efficiency of the service. The suitability findings in Caruso are binding on the appellants in this class since the class is composed of former air traffic controllers removed for 1981 strike participation. Because of OPM's application of an indefinite bar, that issue remains to be decided.

The undisputed record shows that on December 9, 1981, President Ronald Reagan issued a memorandum to the Director of OPM. The memorandum reads as follows:

> The Office of Personnel Management has established the position that the former air traffic controllers who were discharged for

participating in a strike against the Government initiated on August 3, 1981 shall be debarred from federal employment for a period of 3 years. Upon deliberation I have concluded that such individuals, despite their strike participation, should be permitted to apply for federal employment outside the scope of their former employing agency.

Therefore, pursuant to my authority to regulate federal employment, I have determined that the Office of Personnel Management should permit federal agencies to receive applications for employment from these individuals and process them according to established civil service procedures. Your office should perform suitability determinations with respect to all such applicants according to established standards and procedures under 5 C.F.R., Part 731.

After reviewing reports from the Secretary of Transportation and Administrator of the Federal Aviation Administration, I have further

determined that it would be detrimental to the efficiency of operations at the Federal Aviation Administration and to the safe and effective performance of our national air traffic controllers to return to employment with that agency. Therefore, these former federal employees should not be deemed suitable for employment with the Federal Aviation Administration.

I direct you to process their applications for reemployment with the Federal Government accordingly.

Thereafter, OPM Director Donald Devine issued Federal Personnel Manual Bulletin No. 731-6, dated Janury 6, 1982, quoting President Reagan's memorandum in its entirety. In that bulletin, Devine noitified federal agencies that, pursuant to his authority as Director of the OPM, and by delegation of authority from the President of the United States:

. . .

All persons whose employment was terminated on account of the strike by air traffic controllers, which began on or about August 3,

1981, shall be determined not to be suitable for reinstatement or appointment in any position in the Federal Aviation Administration, because it would be detrimental to the efficiency of that agency by interfering with or preventing its effective performance of its duties and responsibilities (C.F.R. 731.202(a)(2).

The undisputed record also shows that OPM has since adhered to the policy enunciated in FPM Bulletin 731-6 concerning applicants for employment with the FAA. Generally, OPM hs implemented that policy by closing without action suitability referrals submitted to OPM by FAA.

The parties have stipulated to the following facts:

1. OPM did not conduct a background investigation on any of the appellants other than to determine that each appellant had been removed from their positions with the FAA for striking in August 1981.
2. OPM found each of the appellants to be unsuitable based solely on a determination that they had been removed from their positions with the FAA for striking in August 1981.

3. The above-stated actions were taken by OPM based on its interpretation of the President's directive of December 9, 1981.

The stipulated issues[3] to be resolved in this class action are as follows:

1. Whether the Presidential directive of December 9, 1981, barring former air traffic controllers fired for striking in August 1981 from reemployment with the FAA imposed an indefinite bar.
2. Whether OPM exceeded its authority in applying the Presidential directive.

The appellants aver that an indefinite bar, in excess of three years, is contrary to law. In this regard, the appellants argue that the congressional intent of 5 U.S.C. § 7311, prohibiting federal employment for

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3. Although appellants initially made general prohibited personnel practice claims, in light of the stipulated issues, those claims, as they might relate to OPM, are deemed abandoned.

4. Tht section was repealed on August 9, 1955

persons striking against the government, was to continue the prior provision of 29 U.S.C. § 188, [4] which imposed a three-year bar to reemployment with the government.

Appellants have cited two legislative history items in an attempt to show that 5 U.S.C. § 7311 is ambiguous. Appellants' first legislative history reference is a letter from the Chairman of the United States Civil Service Commission to the Chairman of the Committee on the Post Office and Civil Service which reads, in pertinent part, as follows:

> Section 305 [29 U.S.C. § 188] of the Labor Management Relations Act forbids striking by Government employees, requires the discharging of an employee who strikes and the forfeiture of his civil service status, if any, and makes him ineligible for employment for 3 years.
>
> For some years provisions similar to the proposed legislation have appeared in appropriation acts each year. The Commission believes that HR 65490 [now 5 U.S.C. § 7311] represents desirable legislation, since it would put such legislation into permanent form, and would also consolidate

and supersede the several statutes which now partially cover the subject.

Appellants also point to a letter to the Committee Chairman from William P. Rogers, Department of Justice, indicating that 29 U.S.C. § 188 would remain unchanged. Finally, appellants argue that Federal Personnel Manual, Chapter 731, as well as 5 C.F.R. § 731.303, reflecting OPM's policy and practice of imposing a maximum three-year bar, is in recognition of congressinal intent in the 5 U.S.C. § 7311.

OPM counters that an indefinite debarment, pursuant to 5 U.S.C. § 7311, is not contrary to congressional intent, and cites a Senate committee report describing the effect of the enabling legislation (Public Law 84-330). That report makes no mention of a debarment limit. OPM also points out that Public Law 84-330 incorporated prior statutes dealing with disloyalty and striking which imposed no time restriction on debarments.

Where a matter of statutory interpretation is at issue, the responsibility of the court is to begin with the language of the statute and to hew closely to it. Martel v. Department of Transportation, 735 Fed. Cir.

504, 507, n. 6 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984). Where a statute's scope is narrow, its language precise, and its application foreseeably mechanical, it would take a strong showing or rare and exceptional circumstances to convince the court that it should not be applied as written. Ciampa v. Secretary of Health and Human Services, 687 F. 2d 518 (1st Cir. 1982) (citing Howe v. Smith, 452 U.S. 473, 483 (1981)). Two circumstances in which the court may look beyond the express language of a statute in order to give force to congressional intent are: where the statutory language is ambiguous; and where a literal interpretation would thwart the purpose of the overall statutory scheme or lead to an absurd result. United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978). See also International Telephone and Telegraph Corporation v. General Telephoine and Electronics Corporation, 518 F. 2d 913, 917-18 (9th Cir. 1975). Neither of these circumstances are shown to be present in 5 U.S.C. § 7311.

In construing a statute not yet judicially interpreted, the court is guided by the plain meaning of the language as well as congressional intent. Janowski v.

International Brotherhood of Teamsters Local 710 Pension Fund, 673 F. 2d 931 (7th Cir.), cert. denied, 103 S. Ct. 130 (1982). While the issue of the length of a debarment has not been specifically decided by the courts, the matter of debarment has been addressed. In United States v. McDonald, 553 F. Supp. 1003 (S.D. Tex. 1983), the court, in construing 5 U.S.C. § 7311, held that the section providing that whoever violates the enactment specifying an individual may not "accept" or "hold" a position in the United States government if he participates in or asserts right to strike against the Government is not void for vagueness. See also United States v. Haggerty, 528 F. Supp. 1286 (D.C. Colo. 1981). Finding that reinstatement would violate 5 U.S.C. § 7311, the court reversed an arbitration award reinstating a striking postal employee. American Postal Workers Union AFL-CIO v. United States Postal Service, 682 F. 2d 1280 (9th Cir. 1982), cert. denied, 103 S.Ct. 1183 (1983). That the penalty [of removal of a striking air traffic controller] includes a barrier to reemployment as a controller is not unreasonable in view of 5 U.S.C. § 7311. Schapansky, 735 F. 2d at 486.

The language of 5 U.S.C. § 7311 is precise, clearly

understandable, unambiguous, and unequivocal in expressing a prohibition against Government employment for an individual who participates in a strike against the United States Government. Nor does that section limit debarment to three years. Thus, an examination of legislative history of that section is unwarranted. Courts do not turn to legislative history to shed light on meaning of easily understandable and unambiguous statutory anactments. Dow Chemical Co. v. United States Environmental Protection Agency, 635 F. 2d 559 (6th Cir. 1980), cert. denied, 452 U.S. 939 (1981). See also Deluxe Check Printers, Inc. v. United States, 5 Ct. Cl. 478 (1984). Generally, legislative history is an inadequate substitute for congressional action. United States v. Devall, 704 F. 2d 1513 (5th Cir. 1983). See also Aronsen v. Crown Zellerbach, 662 F. 2d 584 (9th Cir. 1981), cert. denied, 103 S.Ct. 1183 (1983).

Having found that 5 U.S.C. § 7311 does not impose a maximum three-year debarment, I turn now to the issue of President Reagan's December 9, 1981 directive to OPM.

The Appellants aver that an indefinite debarment

exceeds the intent of the President's directive. Appellants correctly point out that in paragraph one of his directive, President Reagan noted that OPM had established the position that a three-year debarment was applicable to air traffic controllers terminated for striking. Appellants essentially argue that because the directive did not specifically provide that the three-year bar should not be applied, it is reasonable to conclude that such was the expected maximum period of debarment, and that the main purpose of the directive was to waive the three-year bar to employment with federal agencies other than the FAA.

As with 5 U.S.C. § 7311, the President's directive concerning the reemployment of striking air traffic controllers, is explicit -- such former federal employees should not be deemed suitable for employment with the FAA. That statement was preceded in the directive by the President's observation that such employment would be detrimental to the efficiency of operations at the FAA and to the safe and effective performance of our national air traffic control system. I am guided by the plain meaning of the President's language and conclude, accordingly, that the President intended that

striking air traffic controllers should not be reemployed with the FAA. Thus, an indefinite debarment would not be contrary to the President's directive.

Appellants argue that the President's directive, if an indefinite debarment was intended, exceeds Congressional authorization and is, therefore, invalid. Jalil v. Hampton, 460 F.2d 923 (D.C. Cir.), Cert. denied, 409 U.S. 887 (1972).

The President may, pursuant to 5 U.S.C. § 3301, (1) prescribe such regulations for the admission of individuals into the civil service; (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for employment sought; and (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of that section. The courts have held that Executive Orders concerning employment within the competitive service are within the President's constitutional and statutory authority pursuant to 5 U.S.C. §§3301 and 3302. Vergara v. Hampton, 581 F. 2d 1281 (7th Cir. 1978), cert. denied, sub nom Vergara v. Chairman, Merit Systems Protection Board, 441 U.S. 905 (1979). See also Jalil v. Hampton, 590 F. 2d 1120, 1123 n. 3 (D.C. Cir. 1978). In light of

5 U.S.C. § 3301, and the case law concerning the President's authority with respect to employment, I find that appellants' assertion that the President exceeded his authority is without foundation.

OPM regulations concerning employment are promulgated pursuant to delegation of authority by the President pursuant to 5 U.S.C. §§ 1104 and 3301. In accordance with his authority under those sections, President Reagan's directive superseded the provisions of OPM's regulations limiting debarments to three years (5 C.F.R. § 731.303), as they related to air traffic controllers terminated for striking. Presidential Proclamations and Orders have the same force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress. Independent Meat Packers Assoc. v. Butz, 526 F. 2d 228 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976). An Executive Order of the President is to be accorded the force and effect given to a statute enacted by Congress. Farkas v. Texas Instrument, Inc., 375 F. 2d 629 (5th Cir.) cert. denied, 389 U.S. 977 (1967). The promulgation of a national policy by the President is in the nature of the promulgation of a regulation which

is binding on the executive department to which it is directed. McArthur Mining Company v. United States, 167 Ct. Cl. 143 (1964). Cf. National Treasury Employees Union v. Reagan, 653 F. 2d 239 (D.C. Cir. 1981) (President's imposition of a federal hiring freeze was permissible.)

In the closing paragraph of the December 9, 1981 message to OPM, the President directed that any applications for reemployment be processed in accordance with the provisions of that message. The court held in Schapansky, 735 F. 2d at 487, that the President acted within his official responsibility in ordering air traffic controllers to return to work by a deadline, or be fired. Similarly, the President acted within his official responsibility in barring striking air traffic controllers from reemployment with FAA. An executive department is normally required to implement any Presidential policy directive, absent some explicit, legally binding authority to the contrary. American Federation of Government Employees, AFL-CIO v. Brown, 481 F. Supp.. 711 (D.C. Cir. 1979), rev'd and remanded (on other grounds), National Federation of Federal Employees, Local 1622 v. Brown, 645 F. 2d

1017 (D.C. Cir. 1981) (also reversing National Federation of Federal Employees, Local 1622 v. Brown, 481 F. Supp. 704 (D.D.C. 1979)). Because the President's directive, as it relates to the appellants, is not shown to be contrary to law, it is to be afforded the force and effect given to a statute and is binding on OPM.

OPM asserts that its interpretation of the President's message is in accordance with 5 U.S.C. § 7311, which provides that an individual may not accept or hold a position in the Government of the United States if he participates in a strike against the Government of the United States.

OPM's decision to implement the President's directive through the application of an indefinite debarment is within the scope of that directive and is not shown to be inconsistent with the language or purpose of the directive. An administrative interpretation of a Presidential Proclamation is supported by a general presumption of validity. Pancoastal Petroleum, Ltd. v. Udall, 348 F.2d 805 (D.C. Cir. 1965). See also Kester v. Campbell, 652 F. 2d 13 (9th Cir. 1981), cert. denied, sub nom Kester v.

Devine, 454 U.S. 1146 (1982) (in light of its presumed expertise in interpreting executive orders charged to its administration, an agency's interpretation is reviewed with great deference). I find no basis for concluding that OPM's interpretation of the President's message is in error.

Based on the President's authority, pursuant to 5 U.S.C. § 3301, OPM's responsibility concerning personnel management delegated to it by the President pursuant to 5 U.S.C. § 1104, the provisions of 5 U.S.C. § 7311, and the unambiguous instructions in the President's message, I conclude that OPM's indefinite debarment of the appellants from FAA employment, on the basis of suitability, is not contrary to law, rule, or regulation; is supported by preponderant evidence; and is for such cause as will promote the efficiency of the service.

DECISION

The OPM decision indefinitely debarring appellants as unsuitable for FAA employment is AFFIRMED.

NOTICE

This decision is an initial decision of the Merit Systems Protection Board and will become a final

decision of the Board on March 7, 1985 unlss a petition for review is filed with the Board or the Board reopens the case on its own motion. 5 C.F.R. §§ 1201.113 and .117.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

One original and two copies of the petition for review must be filed with the Clerk of the Merit Systems Protection Board, 1120 Vermont Avenue, N. W., Washington, D. C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review, if the Court has jurisdiction, by filing a petition with the U. S. Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D. C. 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the court within 30 days of the final Board decision. 5 U.S.C. § 7703(b)(1).

For the Board:

S. F. VESSER
Presiding Official